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THE INDEPENDENT VOICE OF THE CABLE TELEVISION INDUSTRY

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

January 27, 1995

Re: Ex Parte Notice
MM Docket No. 92-260

DOCKET FILE COPY ORIGINAL

Dear Mr. Caton:

These ex parte comments in the above captioned proceeding are submitted pursuant to a request by Commission Staff during an informal meeting of interested parties on January 18, 1995. The Staff requested that the salient comments made during that meeting that had not been formally submitted in the record be submitted in writing. This summary of the points made by CATA during that meeting is hereby tendered pursuant to that request.

During the January 18 meeting it became apparent that some Commission staff members were considering a radical departure from existing cable regulation in an effort to analogize and treat "the same" both cable and telephone infrastructures as they relate to wiring in Multiple Dwelling Units (MDUs.) CATA made the following observations relating to that proposal:

- First, that it would have the effect of severely limiting, if not eliminating the objective, stated by Chairman Hundt, most of the Congress of the United States, and the Clinton Administration -- particularly Vice President Gore, of achieving true broadband competition. The proposal would create a new "bottleneck" and the

CABLE TELECOMMUNICATIONS ASSOCIATION
3950 CHAIN BRIDGE ROAD
P O BOX 1005
FAIRFAX VA 22030-1005
703/691-8875
703/691-8911 FAX

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consumer would ultimately lose the opportunity to choose multiple broadband services from different providers.

- Second, that as a legal matter, Congress very clearly articulated what it had in mind when it adopted the "inside wiring" provisions of the 1992 Cable Act, and that any proposal such as this to extend the definition of "inside wiring" far beyond the stated Congressional limitation of the individual's premises was well beyond the Commission's jurisdiction.
- Third, that any requirement to move the so-called "demarcation point" significantly outside the actual premises of the subscriber would constitute a massive "taking" of the property of the cable operator who constructed that broadband distribution system for the purpose of being able to offer broadband services to that individual dwelling. Such a taking would require compensation -- including significant compensation for lost business opportunity, compensation that the Federal Government is not likely to be willing to expend.
- Fourth, that the staff errs in even analogizing the cable and telephone infrastructures. They are totally different topologies, with different requirements and, significantly, vastly different technical obligations. Notably, the cable infrastructure has "signal leakage" restrictions imposed upon it that do not exist in telephony. The proposal to "unbundle" the cable infrastructure would also make it almost impossible to police those federal safety regulations, as well as secure the system against theft. This point was forcefully emphasized by members of the Commission's own engineering staff.

It would be a mild understatement for the Commission to think that the cable industry would quietly allow what appears to be a "minor" rule change allegedly designed to "aid cable television competitors" go through without a massive legal and political reaction. The reason for this is simple: that "minor" rule change, which "just equalizes" the rules for cable plant and telephone plant inside buildings would have the effect of fundamentally changing the future prospects in this country for true broadband competition.

In the actual case at hand, a "cable competitor" in New York City is offering cable services on a building by building basis competing with the franchised cable operator, Time Warner. It is relevant to note that

the "competitor" is working closely with Nynex, the Regional Bell Operating Company that provides telephone service to the City. It is also significant that the competitor, Liberty Cable, is owned by one of the largest landlords and property management companies in New York.

All of these additional factors are important when one recognizes what is actually being asked of the Commission. The "competitor" does not want to spend its own capital to actually run its broadband system to potential subscriber's premises. Instead, it wants to force the homeowner, or in this case renter, to choose one, and only one broadband deliverer and create, in essence, a new bottleneck to any other deliverer of broadband signals to those premises. Now why would they want to do that? More importantly, why would the Commission even consider being an accomplice to such a scheme? The result, of course, would be obvious: The wiring OUTSIDE the premises of the subscriber but INSIDE the MDU would, in essence, be ultimately controlled by the landlord. This position was made abundantly clear by representatives of the real estate industry who were very vocal on this point at the meeting. A new bottleneck would be created.

Even without the very thorny "control" issue, which is complicated by numerous different State laws regarding fixtures, easements, etc., it is clear why a company such as Nynex would want the Commission to rule this way: Nynex is about to face local telephone competition in New York (and hopefully, once Congress acts, this competition in local telephony will spread across the country.) If a Nynex surrogate (Liberty) gets control of the only broadband distribution system going directly to an individual subscriber's dwelling for the purpose of delivering cable television, it forecloses the builder of that system, Time Warner, from even offering to provide telephone service to that subscriber -- regardless of who is delivering video! Competition will have effectively been quashed by the Commission.

What the commission staff seems to have totally missed in this exercise is that the broadband distribution plant built by cable operators around the country was not built solely to deliver video. It was designed, and is constantly being upgraded -- at the urging of the Congress, the

Administration, and this Commission, to provide data services, health services, educational services, telephony and a host of other things that we are not even fully cognizant of today. By focusing solely on trying to expedite cable television competition by giving away the cable operator's broadband plant outside the individual dwelling unit, those new services, offered on a competitive basis, would be thwarted. This is directly contrary to the intent of Congress and the instructions explicitly accompanying the Cable Act of 1992.

We need not repeat here what is already in the record of this proceeding. Congress was very aware of what it was doing regarding "inside wiring." It's intent was to avoid having the homeowner inconvenienced by the cable operator removing wiring that had been installed INSIDE the home. For that reason the accompanying reports made VERY clear that the term "inside wiring" ONLY applied to that wire inside the premises of the subscriber. It made clear that the wiring in the common areas of a multiple dwelling unit -- the hallways, stairwells, etc., in other words that wiring in the MDU but not in the premises, was NOT the subject of the "inside wiring" rules. Any court, should it come to that, reading the explicit Congressional concerns about theft of service and technical difficulties such as signal leakage, will have no trouble discerning the boundaries of the Commission's jurisdiction. It is for this reason that CATA is somewhat taken aback that the Commission, which on so many occasions regarding cable regulation has insisted that it strictly abide by the "clear" mandate it was given by Congress, would suddenly consider ignoring the clearly articulated restrictions Congress has placed on it in this regard.

There are very good policy and economic reasons for those restrictions. Congress and the Administration have repeatedly stated they want broadband competition to the home. This proposal would create a bottleneck, hindering that competition. Congress has said that private property should not be taken without FULL compensation. It is impossible to even guess the full extent of the compensation that would be required were the Commission to design a rule that would effectively foreclose all of the new business opportunities enumerated above. It was that opportunity, as well as the delivery of cable television service, that induced most cable operators to build their broadband plants in the

first place. There is no dispute, even among the parties at the meeting of January 18, that "sharing" of the broadband infrastructure going directly to the home is not economically or technically practicable at this time. So if the Commission forces the builder of the first broadband infrastructure to the premises of a subscriber (the cable operator) to give up a key portion of that infrastructure, "the last mile," to a competitor, exactly who does the Commission think will have the incentive to build a second wire? And what economic resources does the government plan to set aside to compensate the builder of the first?

On the other side of this equation, it should be pointed out that there is no real impediment to the competitor (in the instant case, Liberty) building its own broadband infrastructure right to the subscriber's premises, just like the cable operator had to do. This is particularly so in the state of New York, where the laws provide access to MDUs for franchised cable operators. The only difficulty for Liberty (aside from not wanting to spend the money and go to the trouble and effort of construction) is that it does not want to assume all the other legal burdens of being a "cable operator," and thus has chosen to be unfranchised in New York City. Is this, possibly, why the telephone industry is so intent on convincing the Commission that it need not be franchised to offer cable-like services? But even then, as noted in the record herein, we are still talking about an access difficulty in only two percent of the MDUs in the City. For this (and Liberty could gain access even in that 2 percent by reaching agreements with the owners, as most cable companies have had to do for years) the Commission is being asked to turn the future of telecommunications on its head -- to rush in and create a concept of "unbundling" in the cable industry akin to the public utility, common carrier model, despite the fact that the Communications Act SPECIFICALLY says that cable is NOT to be regulated as a common carrier or a utility!

Finally, CATA urges the Commission to consult with its own engineers on the matter of the technical difficulties that would be created. John Wong of the CSB was forcefully articulate on the dangers of signal leakage posed by this proposal. The additional problem of signal theft was highlighted directly in the House Report accompanying the Cable Act of 1992. These problems cannot easily be resolved.

They are an inherent part of the topology of broadband cable distribution. They are not an issue in the telephone infrastructure. It is for that reason, among many others, that it is simply incorrect to equate the treatment of the two infrastructures.

For policy, economic, legal and technical reasons, the proposal to significantly alter the Commission's current "inside wiring" rules as they apply to cable television cannot and should not be adopted. To do so would be a direct affront to the efforts now underway by the Administration and the Congress to design and pass legislation with the goal of achieving true broadband communications competition in the United States. The issues of broadband interconnection, bundling, access, and most importantly competition in telephony are all being considered right now. For the Commission to even consider pre-empting those efforts by adopting the proposal outlined by the staff during the January 18 meeting, characterized by the suggestion that the "...location of the 'demarcation point' really didn't make any difference," is at once both wrong and naive. To do what some on the staff are proposing would have a profound impact on telecommunications policy, if it could withstand both political and legal scrutiny. We doubt it could. The Commission should reject any such suggestion.

Respectfully submitted,

Stephen R. Effros
President

Cable Telecommunications Asssociation
P.O. Box 1005
3950 Chain Bridge Rd.
Fairfax, VA 22030-1005
703-691-8875